In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 32

UNITED STATES OF AMERICA, APPELLANT

v.

ROBERT M. HARRISS, RALPH W. MOORE, TOM LINDER, AND NATIONAL FARM COMMITTEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR THE UNITED STATES

Respondent Harriss insists that under the Criminal Appeals Act the Court must determine the validity of the Lobbying Act on its "face" without regard to the "particular applications of the statute sought to be made in an information filed thereunder" (Harriss Br. 16), and his brief fires repeated broadsides at the entire Act, paying little attention to the specific charges made against these four defendants in the information now before the Court. This memorandum is devoted to a further consideration of this fundamental position on which Harriss's defense is almost entirely based.

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In our main brief (pp. 80–87), we refer to the accepted principles of federal constitutional adjudication which, ever since *Hayburn's Case*, 2 Dall. 409, have moved this Court to refrain from giving advisory or general opinions on constitutionality and have tied constitutional decisions to the case actually before the Court. These principles have been expressly held applicable to constitutional appeals under the Criminal Appeals Act. *United States* v. *Petrillo*, 332 U. S. 1, 5, 10–12; *United States* v. *Congress of Industrial Organizations*, 335 U. S. 106, 110; *United States* v. *Spector* 343 U. S. 169, 172. And in the cases coming here under the Criminal Appeals Act the Court has, as a matter of actual practice, considered the validity of a general criminal statute in the light of the specific facts and circumstances presented in the particular indictment or information. See *United States* v. *Wurzbach*, 280 U. S. 396, 398, 399 (discussed in Government's main brief, pp. 50–51, 56, 77–78); *United States* v. *Classic*, 313 U. S. 299 (validity of federal civil rights legislation as applied to primary election in Louisiana); *United States* v. *Darby*, 312 U. S. 100 (Fair Labor Standards Act); *United States* v. *Southeastern Underwriters Assoc.*, 322 U. S. 533 (Sherman Act as applied to insurance); *United States* v. *Petrillo*, 332 U. S. 1 (Lea Act). See also *United States* v. *Congress of Industrial Organizations*, 335 U. S. 106; *United States* v. *Williams*, 341 U. S. 58. We know of no case under

the Criminal Appeals Act in which the Court has invalidated a statute without looking to the specific allegations of the indictment or information.[1] Cf. *Fleming* v. *Rhodes*, 331 U. S. 100 (holding that 28 U. S. C. 1252 gives this Court jurisdiction, on direct appeal, to review "a ruling against the constitutionality of an act of Congress when the ruling of unconstitutionality is made in the application of the statute to a particular circumstance * * * rather than upon the challenged statute as a whole").

Nothing in the language of the Criminal Appeals Act (now 18 U. S. C. 3731) supports the defendants' position or calls upon the Court to reverse its practice. A direct appeal is permitted "from a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded." 18 U. S. C. 3731. In deciding whether to dismiss an information founded on a federal statute on the ground of invalidity, the

[1] The Court has *upheld*, on direct appeal, an information which repeated the general words of a federal statute (*United States* v. *Petrillo*, 332 U. S. 1, 5–9, 10) while refusing to pass on the validity of the act as applied to other, more specific, parts of the information until further proceedings had determined whether these specific allegations would be retained and proven (*id.*, at 11–13). This result is entirely consistent with the established principle that the Court will not invalidate a statute unless it has no other choice and until it has an appropriate record.

District Court must, as in every constitutional case in a trial court, consider the act on the record then before it, *i. e.*, as the statute is applied in the challenged information. The court's determination necessarily rests on the relationship of the information to the criminal statute. There is no reason why this Court should be in a different position on appeal and must close its eyes to the record before it.[2] Aside from the serious breach in the established canons of constitutional adjudication through the rendering of an advisory opinion unrelated to any facts or particular application, the result of such a change in approach would be the extraordinary situation of review here on a basis totally different from that of the District Court. Respondent's contention would also mean that since review under the Criminal Appeals Act would be divorced from facts or allegations it would be entirely different from review of the same case if the trial judge had upheld the information, if the allegations of the information had been proved and the defendants convicted, the Court of Appeals had affirmed, and this Court had granted certiorari to consider the very same constitutional issues raised by the original motion to dismiss. Even respondent Harriss

[2] There is no question that where issues of statutory construction are involved under the Criminal Appeals Act the Court looks to "the facts alleged in the indictment." *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 47; *United States* v. *Hoy*, 330 U. S. 724, 725; *United States* v. *Hood*, 343 U. S. 148.

does not contend that where review is via the certiorari route this Court must not look at the record. Though the Criminal Appeals Act does supply a shorter route to this Court, the end of the journey is supposed to be approximately the same place.

Respectfully submitted.

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